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**UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF CALIFORNIA  
OAKLAND DIVISION**

In re:

ERICKSEN, ARBUTHNOT, KILDUFF, DAY  
& LINDSTROM, INC.,

Debtor.

Tax I.D. No. 9402271850

Case No.: 23-40134-WJL

Chapter 11 Case

**DEBTOR'S MEMORANDUM IN  
SUPPORT OF CONFIRMATION OF  
PLAN OF REORGANIZATION FOR  
SMALL BUSINESS UNDER CHAPTER  
11**

Date: June 21, 2023

Time: 10:30 a.m. Pacific Time

Place: U.S. Bankruptcy Court

1300 Clay Street, Courtroom 220  
Oakland, CA 94612

Judge: Hon. William J. Lafferty, III

Ericksen, Arbuthnot, Kilduff, Day & Lindstrom, Inc. (the "Debtor"), by and through undersigned counsel, submits the following Memorandum of Points and Authorities in support of

confirmation of the *Plan of Reorganization for Small Business Under Chapter 11* (Doc. No. 107) (the “Plan”).<sup>1</sup> Confirmation of the Plan is supported by the *Declaration of Kyle Everett in Support of Chapter 11 Petition and First Day Motions* (Doc. No. 3); the *Declaration of Kyle Everett in Support of Confirmation of the Plan of Reorganization for Small Business Under Chapter 11* (the “Confirmation Declaration”), which is being filed simultaneously with this Memorandum; and the record before the Bankruptcy Court in this case.<sup>2</sup>

## I. INTRODUCTION AND BRIEF BACKGROUND

The Debtor, a California law firm with a 70-year history in the state, filed this small business bankruptcy case to (i) preserve and maintain its assets while safeguarding client funds and records pending return or transfer of those items to new counsel, (ii) complete an orderly winddown of the Debtor’s operations, (iii) surrender its leased premises, (iii) administer its remaining assets, (iv) and distribute the proceeds through a confirmed Plan. As of the Petition Date, the Debtor’s assets consisted primarily of cash on hand; accounts receivable and work in progress; and various office fixtures, furniture, and equipment.

Since the Petition Date, the Debtor has continued efforts to maximize the value of its assets for all stakeholders for distribution pursuant to the Plan—satisfying its bankruptcy goals and objectives. This has included, among other things, (i) finalizing billings, (ii) transferring matters and files to new counsel, (iii) collecting accounts receivable, (iv) winding down operations, and (iv) appropriately storing and handling client information.

The Debtor filed its Plan on May 3, 2023, and is now seeking confirmation of the Plan. The Plan proposes to pay the Debtor’s creditors from cash on hand as of the Effective Date of the Plan and net proceeds from the collection of all other assets of the bankruptcy estate. The Plan complies with all requirements of the Bankruptcy Code<sup>3</sup> to achieve confirmation and should be confirmed.

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<sup>1</sup> Unless otherwise stated, capitalized terms not otherwise defined herein shall have the meanings ascribed to them in the Plan.

<sup>2</sup> Objections to confirmation are due the same date as this Memorandum. Accordingly, the Debtor reserves the right to address any objections in a supplemental response in advance of confirmation.

<sup>3</sup> All references to the Bankruptcy Code refer to 11 U.S.C. §§ 101 *et seq.*

## II. SUMMARY OF THE PLAN

The Plan contemplates that on the Effective Date, the Debtor shall become a Liquidating Debtor subject to the terms of the Plan and shall function solely to liquidate and administer the assets of the Debtor and bankruptcy estate for the benefit of creditors and interest holders. The Liquidating Debtor is authorized to take any and all actions that may be necessary or appropriate to implement the Plan. Article 10 of the Plan discusses the post-Effective Date operations of the Liquidating Debtor. The classification and treatment of claims and interest is set forth below.

Class 1 consists of Allowed Priority Claims. Class 1 is Unimpaired by the Plan, and in full satisfaction of such claims each holder of an Allowed Claim in Class 1 shall receive: (i) Cash in an amount equal to such Allowed Priority Claim on the Effective Date, or as soon thereafter as is reasonably practicable, or if disputed, as provided elsewhere in the Plan; or (ii) such other treatment to which the Debtor and the holder of the Allowed Priority Claim may agree. Allowed Class 1 Claims are Unimpaired, and as such, are not entitled to vote on the Plan. The Debtor anticipates that the priority portion of the Safe Harbor Nonelective Contribution Claim will be the only Priority Claim. To the extent any portion of the Safe Harbor Nonelective Contribution Claim is not deemed to be a Priority Claim, it shall constitute an Allowed Class 3B Claim. The Safe Harbor Nonelective Contribution Claim is the amount due from the Debtor, acting as a fiduciary, to the Ericksen et. al., Inc. 401(k) Savings Plan, the failure to pay timely which may lead to (i) the inability of the Debtor to deduct the payments on its tax return, (ii) the triggering of various tax compliance testing processes for which the Debtor would need to retain tax advisors, (iii) an audit by the IRS for which the Debtor would need to retain tax advisors, (iv) ultimately, if certain conditions are met, the disqualification of the 401(K) Savings Plan, which could result in all funds in such plan being treated as immediately taxable to all participants, including many of the Debtor's former employees, and require the Debtor to retain tax advisors to advise on the effects of same and whether the Debtor's tax returns would need to be amended or modified for previous years and the effects on same on the Debtor's former employees; and (v) the IRS having substantial priority tax claims against the Debtor that could significantly reduce or eliminate certain other payments

1 contemplated by the Plan.

2 Class 2A consists of the Claim of Bank of the West, to the extent allowed as a Secured  
3 Claim under Section 506. Class 2A is Unimpaired by the Plan, and in full satisfaction of such claims  
4 each holder of an Allowed Claim in Class 2A shall receive payment in full on the later of the  
5 Effective Date or the date on which such claims become Allowed, with interest to the extent  
6 necessary to render the Claim Unimpaired. Allowed Class 2A Claims are Unimpaired, and as such,  
7 are not entitled to vote on the Plan. The Debtor anticipates Allowed Class 2A Claims to be \$0 -  
8 \$1,000.

9 Class 2B consists of the Claim of Corodata Records, to the extent allowed as a secured  
10 claim under Section 506. Class 2A is Unimpaired by the Plan, and in full satisfaction of such claims  
11 each holder of an Allowed Claim in Class 2A shall receive payment in full on the later of the  
12 Effective Date or the date on which such claims become Allowed, with interest to the extent  
13 necessary to render the Claim Unimpaired. Allowed Class 2B Claims are Unimpaired, and as such,  
14 are not entitled to vote on the Plan. The Debtor anticipates Allowed Class 2B Claims to be  
15 approximately \$6,303.76.

16 Class 2C consists of the Claim of Iron Mountain, to the extent allowed as a secured claim  
17 under Section 506. Class 2A is Unimpaired by the Plan, and in full satisfaction of such claims each  
18 holder of an Allowed Claim in Class 2A shall receive payment in full on the later of the Effective  
19 Date or the date on which such claims become Allowed, with interest to the extent necessary to  
20 render the Claim Unimpaired. Class 2C Claims are Unimpaired, and as such, are not entitled to  
21 vote on the Plan. The Debtor anticipates Allowed Class 2C Claims to be approximately \$3,176.62.

22 Class 3A consists of Allowed General Unsecured Claims. In full satisfaction of Allowed  
23 Claims in Class 2C, each holder of an Allowed Claim in Class 3A shall receive its pro rata share of  
24 the Class 3A Distributions until each Holder has received the Allowed amount of such Holder's  
25 Class 3A Claim, with all incurred interest from the Petition Date through the date such Claims are  
26 paid in full. Interest shall accrue at the prevailing federal judgement rate of interest. Class 3A  
27 Claims are Impaired, and as such, are entitled to vote on the Plan. The Debtor estimates the amount  
28

1 of General Unsecured Claims pending against the Debtor is approximately \$1.9 million, exclusive  
2 of the Repurchase Claims, and approximately \$4.5 million, inclusive of the Repurchase Claims  
3 (both amounts are prior to any claims objections or requests to subordinate claims)

4 Class 3B consists of the Allowed Safe Harbor Nonelective Contribution Claims. The Safe  
5 Harbor Nonelective Contribution Claim shall be deemed Allowed in the amount of \$288,792.33  
6 less any amounts included as Allowed Class 1 Claims. Class 3B is Unimpaired by the Plan, and in  
7 full satisfaction of such claims each holder of an Allowed Claim in Class 3B shall receive: (i) Cash  
8 in an amount equal to such Allowed Class 3B Claim on the Effective Date, or as soon thereafter as  
9 is reasonably practicable; or (ii) such other treatment to which the Debtor and the holder of the  
10 Allowed Class 3B Claim may agree. Class 3B Claims are Unimpaired, and as such, are not entitled  
11 to vote on the Plan. The Debtor anticipates Allowed Class 3B Claims to be the Safe Harbor  
12 Nonelective Contribution claim of \$288,792.33, less any amounts of such claim treated as an  
13 Allowed Class 1 Claim.

14 Class 4 consists of (i) Allowed Equity Security Interests, and (ii) Allowed Subordinated  
15 510(b) Claims. In full satisfaction of Allowed Claims in Class 4, each holder of an Allowed Claim  
16 in Class 4 shall receive distributions from the Liquidating Debtor in accordance with their  
17 respective percentage Interests in the Debtor after payment in full of all unclassified and classified  
18 claims and after taking into account any amounts paid by the Debtor on account of such Equity  
19 Security Interests. Class 4 Claims are Impaired, and as such, are entitled to vote on the Plan. The  
20 Debtor notes that Repurchase Claims of approximately \$2.5 million were filed against the Debtor  
21 as general unsecured or priority claims, and the Debtor plans to file a motion or adversary  
22 proceeding asking the Bankruptcy Court to determine whether such claims should be subordinated  
23 under Section 510(b) of the Bankruptcy Code. To the extent the Repurchase Claims are  
24 subordinated, they shall be Class 4 Claims. To the extent the Repurchase Claims are not  
25 subordinated, they shall remain Class 3A Claims.

26 **III. THE PLAN SHOULD BE CONFIRMED BECAUSE IT MEETS ALL**  
27 **CONFIRMATION REQUIREMENTS FOR A SUBCHAPTER V CASE**

28 Bankruptcy Code Sections 1191(a) and (b) incorporate all the plan confirmation

requirements of Section 1129(a) (except that compliance with paragraph (15) of Section 1129(a) is not a requirement for confirmation under either Sections 1191(a) or (b)). If the requirements of Sections 1129(a)(8), (10), and (15) are not met, then Section 1191(b) permits the court to confirm the plan if the plan does not discriminate unfairly and is fair and equitable as to the classes of creditors and interests that did not accept the Plan.

In this case, all applicable requirements of Section 1129(a) are met and thus the Plan can be confirmed under Section 1191(a). Alternatively, even if the Court were to find that the Debtor did not satisfy Section 1129(a)(8), (10), or (15), confirmation is still appropriate under Section 1191(b) of the Bankruptcy Code.

A plan proponent must demonstrate each element of Section 1129 by a preponderance of evidence. *In re Arnold & Baker Farms*, 177 B.R. 648, 654 (9th Cir.B.A.P.1994), *aff'd*, 85 F.3d 1415, cert. denied, 519 U.S. 1054 (1997). Additionally, the Court may consider the entire record in the bankruptcy case when considering confirmation. *In re Acequia, Inc.*, 787 F.2d 1352, 1359 (9th Cir. 1986).

**Section 1129(a)(1)**: A court may confirm a chapter 11 plan only if “[t]he plan complies with the applicable provisions of [the Bankruptcy Code].” 11 U.S.C. § 1129(a)(1). “Those applicable provisions generally concern whether the proposed plan contains the terms both required or permitted by Section 1123, and that the designation of classes included in the proposed plan complies with Section 1122.” *In re Islet Scis., Inc.*, 640 B.R. 425, 457–58 (Bankr. D. Nev. 2022). Section 1122 is satisfied because the Plan only places claims in classes that are substantially similar. Section 1123(a) is satisfied because the Plan designates classes of claims and interests, specifies whether the classes are impaired or unimpaired, specifies the treatment of any class that is impaired, provides the same treatment for each claim in a particular class unless otherwise agreed to, describes adequate means to implement the Plan, and is consistent with the best interests of the creditors and equity security holders. Section 1123(b) provides that a Plan may contain certain other provisions, some of which are applicable in this case. For example, the Plan may provide for the assumption of any not previously rejected executory contract (*see* Section 6.01 of the Plan) or the

1 Plan may provide for the retention and enforcement of claims or interests by the Debtor or Trustee  
2 (see Section 10.05 of the Plan). Separately, Section 1190(1) of the Bankruptcy Code provides that  
3 a subchapter V plan must include a brief history of the business operations of the debtor, a  
4 liquidation analysis, and projections about the debtor's ability to make the required plan payments.  
5 The Plan includes those requirements. Accordingly, Section 1129(a)(1) is satisfied.

6 **Section 1129(a)(2)**: This section mandates that "[t]he proponent of the plan complies with  
7 the applicable provisions of this title." 11 U.S.C. § 1129(a)(2). The primary purpose of this section  
8 is to ensure that the proponent has complied with the disclosure and solicitation requirements of  
9 Sections 1125 and 1126. *In re Juarez*, 603 B.R. 610, 626 (B.A.P. 9th Cir. 2019), *aff'd*, 836 F. App'x  
10 557 (9th Cir. 2020). Section 1125 is inapplicable unless the Court orders otherwise (which it did  
11 not in this case). Additionally, plan modification is controlled by Section 1193, which provides:  
12 "The debtor may modify a plan *at any time* before confirmation, but [the debtor] may not modify  
13 the plan so that the plan as modified fails to meet the requirements of sections 1122 and 1123..."  
14 11 U.S.C. § 1193. Here, the Debtor has complied with all applicable disclosure and solicitation  
15 requirements of the Bankruptcy Code, and any proposed plan modifications will comply with  
16 Section 1193. Accordingly, Section 1129(a)(2) is satisfied.

17 **Section 1129(a)(3)**: A bankruptcy court may confirm a plan only if the plan is proposed "in  
18 good faith and not by any means forbidden by law." 11 U.S.C. § 1129(a)(3). This section does not  
19 define good faith. Courts have described that a plan is proposed in good faith where it achieves a  
20 result consistent with the objectives and purposes of the Bankruptcy Code. *In re Sylmar Plaza, L.P.*,  
21 314 F.2d 1070, 1074 (9th Cir. 2002). Here, the Plan is proposed in good faith because it achieves  
22 the orderly liquidation of the Debtor, maximizes the value of the Debtor's estate, and provides a  
23 means for administration of creditor claims, all of which are consistent with the objections and  
24 purposes of the Bankruptcy Code. The Plan is not proposed by any means forbidden by law.  
25 Accordingly, Section 1129(a)(3) is satisfied.

26 **Section 1129(a)(4)**: A bankruptcy court may confirm a plan only if "[a]ny payment made  
27 or to be made by the proponent, by the debtor, or by a person issuing securities or acquiring property  
28



1 under the plan, for services or for costs and expenses in connection with the case, or in connection  
2 with the plan and incident to the case, has been approved by, or is subject to the approval of, the  
3 Court as reasonable.” 11 U.S.C. § 1129(a)(4). Pursuant to the Plan, the Bankruptcy Court must  
4 approve all professional fees and expenses before they may be paid (*see* Section 3.02 of the Plan).  
5 Accordingly, Section 1129(a)(4) is satisfied.

6 **Section 1129(a)(5)**: Subsection A requires the proponent of any plan to disclose the  
7 “identity and affiliations of any individual proposed to serve, after confirmation of the plan, as a  
8 director, officer, or voting trustee of the debtor, an affiliate of the debtor participating in a joint plan  
9 with the debtor, or a successor to the debtor under the plan,” and requires a finding that “the  
10 appointment to, or continuance in, such office of such individual, is consistent with the interests of  
11 creditors and equity security holders and with public policy.” 11 U.S.C. § 1129(a)(5)(A)(i)-(n).  
12 Subsection B requires the proponent of a plan to disclose the “identity of any insider that will be  
13 employed or retained by the reorganized debtor, and the nature of any compensation for such  
14 insider.” 11 U.S.C. § 1129(a)(5)(B). The Plan discloses the post-confirmation structure and  
15 administration of the Liquidating Debtor, including the appointment of the Manager for the  
16 Liquidating Debtor (*see* Section 8.07 of the Plan), and the continued involvement of the Manager  
17 in the Debtor’s winddown is consistent with public policy and will maximize the value of the  
18 Debtor’s estate. Accordingly, Section 1129(a)(5) is satisfied.

19 **Section 1129(a)(7)**: This section requires that the plan be in the best interests of creditors  
20 and equity holders. With respect to each impaired class of claims or interests, each holder of a claim  
21 or interest in that class must either accept the plan or receive under the plan at least as much as it  
22 would receive on liquidation. This is often referred to as the “best interest of creditors test.” *In re*  
23 *Bashas’ Inc.*, 437 B.R. 874, 914 (Bankr. D. Ariz. 2010) (internal citations and quotations omitted).  
24 Under the Plan, Classes 3A and 4 are impaired. As demonstrated in the Liquidation Analysis  
25 attached to the Plan, in a chapter 7 liquidation, the amount available for distribution would be  
26 approximately 15% less than anticipated distributions under the Plan. Accordingly, Section  
27 1129(a)(7) is satisfied.



1        **Section 1129(a)(8)**: This section is satisfied because all impaired accepting classes voted to  
2 accept the Plan. This is reflected in the Debtor’s Ballot Summary filed on June 15, 2023 (Doc. No.  
3 149).

4        **Section 1129(a)(9)**: This section generally requires that claims entitled to priority under  
5 section 507(a)(2) and (3) of the Bankruptcy Code be paid in full in cash on the effective date of the  
6 plan, unless the holder thereof has agreed to a different treatment of such claim. Here, the Plan  
7 complies with this section by providing that “Each holder of an administrative expense claim  
8 allowed under § 503 of the Code will be paid in full on the Effective Date of this Plan, in Cash (a)  
9 on the Effective Date if the Claim is then an Allowed Claim; (b) as soon as reasonably practicable  
10 after entry of an order Allowing the Claim, if the Claim is not an Allowed Claim as of the Effective  
11 Date; or (c) upon such other terms as may be agreed upon by the holder of the claim and the  
12 Debtor.” Accordingly, Section 1129(a)(9) is satisfied.

13        **Section 1129(a)(10)**: This section requires at least one impaired accepting class to accept  
14 the plan. Both impaired classes voted to accept the Plan, as demonstrated by the Debtor’s Ballot  
15 Summary filed on June 15, 2023 (Doc. No. 149).

16        **Section 1129(a)(11)**: This section requires a plan be feasible to be confirmed. A plan is  
17 feasible if it “offers a reasonable prospect of success and is workable.” *In re Farwest Pump Co.*,  
18 621 B.R. 871, 891 (Bankr. D. Ariz. 2019) (internal citations and quotations omitted). Here, the Plan  
19 provides payments on the Effective Date and that the Liquidating Debtor make distributions and  
20 administer the remaining assets of the estate. It offers a reasonable prospect of success and will be  
21 supported through experienced restructuring professionals who have an in-depth knowledge of the  
22 Debtor’s business operations, assets, and liabilities. The Debtor has more than sufficient cash on  
23 hand to pay all distributions required on the Effective Date. Accordingly, Section 1129(a)(11) is  
24 satisfied.

25        **Section 1129(a)(12)**: This section requires payment of certain statutory bankruptcy fees.  
26 Section 3.04 of the Plan provides that “All fees required to be paid under 28 U.S.C. § 1930 that are  
27 owed on or before the effective date of this Plan have been paid or will be paid on the Effective  
28

1 Date.” Accordingly, Section 1129(a)(12) is satisfied.

2 **Section 1129(a)(6), (13)-(16)**: These sections are inapplicable to this Plan.

3 **Section 1191(b)**: Finally, for the avoidance of doubt, if the Court were to find that any of  
4 sections 1129(a)(8), (10), or (15) are not met (which the Debtor asserts they are), the Plan may still  
5 be confirmed if the Plan does not discriminate unfairly and it is fair and equitable with respect to  
6 all nonconsenting classes. Here, to the extent this section applies, it is satisfied. The Plan (i)  
7 provides for distributions in accordance with the priorities set forth in the Bankruptcy Code, (ii)  
8 provides that unsecured creditors receive value, as of the effective date of the plan, equal to the  
9 allowed amounts of their claims, and (ii) provides that equity interests will be paid only to the extent  
10 funds are available after satisfaction of all creditor claims. Accordingly, the Plan is fair and  
11 equitable, does not discriminate unfairly, and should still be confirmed.

12 **IV. THE DEBTOR RESERVES THE RIGHT TO MODIFY THE PLAN AND TO  
ADDRESS PLAN OBJECTIONS**

13 The Debtor may modify the Plan at any time before confirmation pursuant to 11 U.S.C §  
14 1193(a). The Debtor reserves the right to modify the Plan prior to or at confirmation and may file  
15 a supplement or plan modification brief prior to the hearing on confirmation of the Plan.  
16 Additionally, because objections to confirmation are due today, the Debtor reserves the right to  
17 supplement this memorandum to address any confirmation objections.

18  
19 Dated: June 16, 2023

Respectfully submitted,

20 BAKER & HOSTETLER LLP

21 By: /s/ Andrew V. Layden  
22 Andrew V. Layden

23 *Attorneys for the Debtor*